

THE STATE OF NEW HAMPSHIRE
SUPREME COURT

In Case No. 2003-0563, State of NH v. Benjamin Tyrance, the court on September 23, 2004, issued the following order:

Following a jury trial, the defendant, Benjamin Tyrance was convicted of conspiracy to commit robbery, armed robbery and robbery. On appeal, he contends that the trial court erred in admitting the statements of his co-conspirators, see N.H.R. Ex. 801(d)(2)(E), and that his convictions for both armed robbery and robbery violate the double jeopardy provision of the New Hampshire Constitution, see N.H. CONST. pt. I, art. 16. We affirm in part and vacate his conviction for robbery.

Rule 801(d)(2)(E) provides that a statement is not hearsay if it is offered against a party and is “a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.” N.H.R. Ex. 801(d)(2)(E). “Out-of-court statements by co-conspirators are admissible as exceptions to the hearsay rule when the statements are made during the pendency of the criminal enterprise and in furtherance of the criminal object, as long as the existence of the conspiracy is sufficiently proved by independent evidence.” State v. Batchelder, 144 N.H. 249, 251 (1999) (brackets omitted).

In this case, the defendant argues that because no evidence was presented that he was a part of the conspiracy at the time the statements were made, the trial court erred in admitting them under Rule 801(d)(2)(E). A review of the record indicates, however, that this argument was not presented in the trial court and is therefore not preserved for our review. See State v. Winstead, 150 N.H. 244, 246 (2003) (contemporaneous objection that states explicitly the specific ground of objection is required to preserve issue for appellate review).

The defendant also argues that his convictions for armed robbery and robbery violate the double jeopardy provision of the New Hampshire Constitution. The State contends this issue has also not been properly preserved. In addressing this issue in its brief, the State indicates that if we find the issue properly preserved, it does not contest that if the defendant’s conviction for armed robbery is affirmed, his conviction for the lesser offense of robbery

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should be vacated. Under the unique circumstances of this case, we vacate the defendant's conviction for robbery.

Affirmed in part; vacated in part.

NADEAU, DALIANIS and DUGGAN, JJ., concurred.

**Eileen Fox,
Clerk**

Distribution:

Clerk, Hillsborough County Superior Court (S) 02-S-0115 - 0117

Honorable Richard E. Galway

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Marta E. Rodriguez, Esquire

Mr. Benjamin Tyrance

Chris McLaughlin, Esquire

Nicholas P. Cort, Esquire

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Case Manager

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